STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
BECKERING, P.J., and BORRELLO and GLEICHER, JJ.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

FLOYD ALLEN,

Defendant-Appellee.
_____/

Supreme Court No. 151843

Court of Appeals No. 318560

Ionia Circuit Court No. 13-15693-FH

REPLY BRIEF OF APPELLANT PEOPLE OF THE STATE OF MICHIGAN

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Dated: February 17, 2016

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INTRODUCTION

The parties agree: The Court of Appeals erred in holding as a categorical matter that a second-offense SORA violation cannot be enhanced using the habitual-offender statutes. The Court of Appeals' holding is contrary to the case law of this Court and of the Court of Appeals, and contrary to the statutory language.

The only question is whether Allen is entitled to prevail on the alternative ground he asserts: that a SORA-2 sentence cannot be enhanced by the habitual-offender statutes using the same prior conviction that was used to elevate the offense to SORA-2. Allen advances no argument and cites no authority in support of this argument. The Court of Appeals has rejected it in a virtually identical context. And, as the People have noted, there is nothing wrong with using the same prior conviction to elevate a crime or increase punishment in multiple ways simultaneously, as long as this conclusion follows from the statutory language. The Legislature has not provided any limitation in the habitual-offender provisions that would exclude a SORA-2 conviction. Allen's argument fails.

Allen also repeats his reasons why he feels this case does not merit leave to appeal. He raises no arguments this Court did not already reject when it granted leave to appeal. This Court need not second-guess its decision.

Allen also says that this case is mooted by his parole. He is wrong, because the question here affects his maximum sentence, which still matters. But even if he is right, this Court should still vacate the erroneous portion of the opinion below.

This Court should reverse.

ARGUMENT

I. Allen recognizes that some recidivist provisions may be applied along with habitual offender enhancements and others may not, and he correctly concedes that SORA-2 falls into the former category.

Relying on *People v Fetterley*, 229 Mich App 511 (1998), and *People v Eilola*, 179 Mich App 315 (1989), Allen presents the answer to the question presented here as, "**it depends.**" (Def's Br on Appeal, p 3.) If true, this raises the questions, what does the answer depend *on*, and then, what is the answer?

Allen appears to agree with the People that the appropriate test is that laid out by the Court of Appeals in *Fetterley*: "Where the legislative scheme . . . elevates the offense, rather than enhances the punishment, on the basis of prior convictions, both the elevation of the offense and the enhancement of the penalty under the habitual offender provisions is permitted." 229 Mich App at 540–541.

Allen does not explicitly say whether the sex offenders registration act "elevates the offense" or "enhances the punishment." But he emphatically says that both the recidivist provision and the habitual enhancement can both be applied under some circumstances. (Def's Br on Appeal, pp 5–6.) This concedes the question—the parties agree that the Court of Appeals erred in holding that the statutes conflict and that application of both provisions is categorically barred. He was right to concede this point because the failure to register a second time is a more serious offense. The higher penalty reflects that more aggravated nature of this offense, not the mere fact that Allen had previously been convicted of a SORA violation.

The remaining question is whether the application of both provisions is permitted under *these* facts. Allen's sole argument is that, although both provisions may be applied simultaneously in the abstract, they cannot both be applied using the same prior conviction. Allen gives no basis for this argument, and there appears to be none. The Court of Appeals rejected this argument with respect to the retail-fraud statutes in *People v Brown*, 186 Mich App 350, 357 (1990). And although a denial of leave has no precedential value, it bears noting that this Court denied leave in *Brown* only after holding the application in abeyance for *People v Bewersdorf*, 438 Mich 55 (1991) (holding that a defendant could be convicted of OUIL, third offense and also be subject to the habitual offender statute). 439 Mich 873 (1991).

Allen does not explain why he believes *Brown* was wrongly decided, or why the retail-fraud statute is distinguishable from SORA in this aspect. Nor does he contend with the fact that, as a general matter, there is nothing wrong with considering the same prior conviction for multiple different purposes. *Brown* was persuasively reasoned and correctly decided, and there is no principled distinction between the retail-fraud statutes at issue in *Brown* and the SORA provisions.

This Court should accept the parties' agreement that there is nothing wrong with enhancing a SORA-2 sentence using the habitual offender statutes in the abstract, but reject Allen's unsupported argument that the enhancement cannot be made using the same prior conviction. It should then reverse the Court of Appeals.

II. Allen's arguments against granting leave are misplaced.

Allen devotes two pages of his six-page argument to "an aside," arguing that this case does not warrant a grant of leave to appeal. (Def's Br on Appeal, pp 6–7). These arguments are misplaced, because this Court has already granted the application for leave to appeal. Allen does not raise any arguments here that he did not make in his brief in opposition to leave, and there is no reason for this Court to second-guess its decision to grant leave.

III. Because the decision in this case affects Allen's maximum sentence, which he has not yet completed, this appeal is not moot.

Allen was paroled on March 24, 2015, before the Court of Appeals issued its opinion. Allen claims that his parole mooted this case. It did not. Allen will not be discharged from parole until June 24, 2016, at the earliest. Before that, Allen may violate parole, and may still be returned to prison to serve more of his sentence. Thus, his maximum sentence still matters. If the Court of Appeals' erroneous ruling stands, Allen's maximum sentence will be reduced by three and a half years.

If, however, this Court agrees with Allen that his parole rendered this issue moot, then the issue was moot before the Court of Appeals decided it. Thus, if this Court were to conclude the issue is moot, that same reasoning would require this Court to vacate the portion of the Court of Appeals' opinion that improperly decided a moot question. *People v Richmond*, 486 Mich 29, 36, 41 (2010) (holding that the Court of Appeals "did not have the power to decide" a moot question).

CONCLUSION AND RELIEF REQUESTED

The People respectfully request that this Court reverse the judgment of the Court of Appeals.

Respectfully submitted,

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